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No. 07-142

FILED
SEP 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MEMORIAL DAY WEEKEND SALUTE
TO VETERANS CORPORATION,

Petitioner,

v.

BILL WICKERSHAM AND MAUREEN DOYLE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Bill Wickersham and Maureen Doyle submit this brief in opposition to the petition for certiorari filed by Memorial Day Salute to Veterans Corporation.

STATEMENT

At its base, this case involves the liability of a private event organizer for restricting the protected speech activities of air show attendees in the face of extensive entwinement with a public entity, and whether an organizer so situated may invoke its own First Amendment rights to prohibit all unwanted attendee speech. Neither of these issues is appropriate for this Court's consideration because the holdings do not conflict with any decisions of this Court or of the United States Courts of Appeal and are dependent upon a fact intensive inquiry.

On the state action question, the Eighth Circuit relied upon this Court's reasoning in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) to govern its inquiry: "The key issue is whether Salute may appropriately be considered a state actor in the circumstances presented." App. 11a. Regarding Salute's First Amendment defense, the Eighth Circuit framed the issue as whether Salute's speech includes those in attendance and, if not, whether attendee speech otherwise affects Salute's message. App. 17a.

Petitioner Salute's stated issues in support of its petition for writ of certiorari are two-fold: 1) that the Eighth Circuit's answer to the state action question is in conflict with decisions of the Fourth and Sixth Circuits and 2) that the court below incorrectly concluded that the First Amendment did not protect Salute from the speech of attendees at this public event. These issues arise in the

following context, which is not fully presented in the petition for certiorari.

Salute has held an air show at the City of Columbia's public airport since 1993. Pet. App. 2a. For this two day event, the City executes a contract which provides Salute exclusive control over the airport's tarmac during the air show without charge and with the proviso that the City may regain control in emergency situations. Pet. App. 2a and 3a. The City executed this contract despite an ordinance, repealed in 2005 after this litigation ensued, which provided that the city could not enter into leases or contracts which impaired its control of the airport. Pet. App. 3a.

Each year tens of thousands of people attend the air show which is free and open to the public. Pet. App. 2a. At all other times, the general public does not have access to the tarmac. Pet. App. 3a. The air show is "fair like and generally open . . ." and includes the expected aerial acrobatics by military planes as well as various entertainment activities on the secured tarmac, including food and souvenir booths, static displays of aircraft and antique automobiles, outside advertisements honoring the military or promoting commercial ends and military recruiters as well as exhibits such as a climbing wall, adventure van, obstacle course and shooting gallery. Pet. App. 2a, 24a and 63a. The 2005 air show also included a toy police car with a robot driver and a radio station van broadcasting from the tarmac. Pet. App. 24a. At noontime each day of the event, there is a ceremony to honor fallen veterans. Pet. App. 3a.

The air show cannot occur without extensive and close cooperation between Salute and the City. Salute decides

the content of the air show, including the schedule of events, guests to be honored and exhibits. Pet. App. 3a. The City is responsible for operating the airport during the air show and coordinating with the Federal Aviation Administration to ensure the air show's compliance with federal regulations and has primary responsibility for the "Ground Operations Plan." Pet. App. 3a and 4a. This support, according to Salute, is "absolutely essential" to the air show's success. Pet. App. 3a. In addition, city officials participate in meetings to prepare for the air show throughout the year. Pet. App. 4a and 69a. All of this City involvement, as well as other non-traditional services, such as the City's arranging public transportation to and from the air show, are at no cost to Salute. Pet. App. 4a and 69a.

As a condition for Salute's access to military planes for the air show, both Salute and the City are required to sign an application to the Department of Defense representing that the event is "officially supported by local government" and open to the public. Pet. App. 4a. While Salute provides a disclaimer in media releases that the City does not sponsor the air show and the air show contract provides that Salute and the City are not partners, the City advertises the air show on its website under the titles "Guide to City Services" and "Public Works Provided for Residents and Businesses." Pet. App. 4a. In addition, City officials described the City airport's part in the air show as a "community partner" and "host." Pet. App. 69a.

Salute devised various conduct rules applicable to attendees at the air show, including "prohibitions against soliciting, petitioning, leafleting, political campaigning, and 'unauthorized signs.'" Pet. App. 4a-5a. City police (identifiable by their badges) provide security at the air

show, at the City's expense, and develop a security plan that specifically incorporates all of Salute's speech restrictions.[1] Pet. App. 5a. The City enforced these restrictions due to its contract with Salute and Salute's president testified that the police enforced the restrictions "'on [Salute's] behalf.'" Pet. App. 7a.

Until the District Court's 2005 preliminary injunction order, the security plan generally provided something to the following effect: "no protests are permitted inside the tarmac fence." Pet. App. 5a and 20a, n.3. Although Salute did not develop the security plan, Salute provided the City instruction as to prohibited activities. Pet. App. 5a. Consistent with these instructions, in 2003 the City circulated a memo to its police officers which provided the following:

> Protestors are likely at the show. . . . Should protesters attempt to enter the premises, officers will immediately advise the Command Center and will stop their forward progress. Officers will advise them of the area being private property and of the restrictions related to carrying signs, seeking signatures to petitions, or demonstrating. Any person who persists in entering will be

[1] Captain Martin was unaware of City police ever being called upon to enforce a private organization's speech restrictions at any event other than the air show. Pet. App. 5a-6a. Nor is First Amendment protected activity intrinsically inconsistent with an air show as Salute suggests at various points in its petition. In fact, as part of his air show duties, Captain Martin annually attends the International Convention of Air Shows where he receives training in protecting the free speech rights of attendees while maintaining security at air shows. Pet. App. at 71a; Martin Dep. at 19-21. That air shows and attendee exercise of First Amendment activities are compatible is further evidenced by the fact that at the 2005 air show some attendees engaged in the First Amendment activities allowed by the district court's injunction without disrupting it. Pet. App. 25a.

> given a trespass warning prior to arrest. Keep in mind that persons are not restricted from entering, only those who intend to conduct a protest once entry is made.

Pet. App. 5a. Captain Martin, who coordinated the air show's security force, testified that Salute's president "was the final arbiter of what constituted unwanted protest at the event." Pet. App. 5a-6a. In fact, if Salute requested it, the City police would go so far as to remove someone on account of his race. Pet. App. 6a.

It was the application of these rules at the 2004 air show that led to the current litigation. A City police officer confronted Respondent Maureen Doyle after he observed her distributing anti-war fliers on the secured tarmac. An officer confiscated her fliers and she was threatened with arrest if she continued. Pet. App. 6a. Likewise, a City police officer approached and then detained Respondent Bill Wickersham on the secured tarmac when he refused to stop collecting signatures on a renewable energy petition. Pet. App. 6a. After consulting with Salute's President and at her direction, the officer arrested Mr. Wickersham and issued him a ticket for trespassing. Pet. App. 6a.

Based upon these and other facts, the district court issued a preliminary injunction finding that Salute and the City acted under color of state law in prohibiting certain speech activities and ordering that they permit the public to distribute leaflets and wear expressive clothing at the 2005 air show, but prohibiting the circulation of petitions or other types of solicitation. Pet. App. 7a. Later, as part of its order for a permanent injunction, the district court expanded the list of permissible activities to include the carrying of signs and recognized that Salute could

restrict all attendee expressive activities during the solemn noontime ceremony. Pet. App. 9a.

Following the preliminary injunction, Salute disavowed by letter its role in directing the City police. Pet. App. 7a. Nonetheless, the security operation at the 2005 air show did not change except the police enforced Salute's restrictions on speech subject to the district court's order. Pet. App. 8a. Although no one attempted to circulate a petition, Captain Martin testified "that he would have stopped anyone who did, not because such activity violated a city ordinance, but because Salute disapproved it and it was not protected by the preliminary injunction." Pet. App. 8a.

Although, as Salute notes in its petition (p. 8), a few 2005 air show attendees filled out comment cards complaining about the presence of "protestors," there was no evidence that the few individuals who engaged in leafleting and carried signs at the air show caused any disruption. Pet. App. 8a.

Salute, but not the City, appealed the district court's entry of a permanent injunction, challenging the court's finding that it acted under color of state law and that allowing attendee speech did not infringe its First Amendment rights. The Eighth Circuit rejected Salute's arguments on both issues, relying primarily on undisputed facts.

The Eighth Circuit addressed Salute's claim that it did not act under color of state law using this Court's fact-intensive analysis for imposing state actor status upon a private entity, as set forth in *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288 (2001), *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982) and *Burton v.*

Wilmington Parking Auth., 365 U.S. 715 (1961). Pet. App. 10a-12a.

The court found: "the city's role was far more than 'mere acquiescence,' for the city not only provided critical assistance in planning and operating the show, but also played an active role in enforcing the particular speech restrictions challenged in this action." Pet. App. 12a-13a. Based upon these facts, the Eighth Circuit readily distinguished *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000) and *UAW, Local 5285 v. Gaston Festivals*, 43 F.3d 902 (4th Cir. 1995), stating "[t]he direct role of the Columbia police in enforcing Salute's speech restrictions provided the critical nexus, absent in other cases, between the challenged conduct and the exercise of state authority." Pet. App. 13a. While recognizing that mere invocation of police assistance does not make a private party a state actor, the Eighth Circuit held that the facts demonstrated that "[t]he city's cooperation with Salute was directed toward effectuating the challenged policy rather than merely keeping the peace." Pet. App. 13a-14a.

The Eighth Circuit next considered Salute's claim that it had a First Amendment right to exclude the unwanted speech under *Hurley v. Irish American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995). Unlike *Hurley*, where the evidence established that the content of the parade, including its participants, constituted the organizer's speech, the Eighth Circuit found that Salute's evidence fell short because it failed to show that "its message was dependent upon the composition of the crowd at the air show." Pet. App. 17a.

The court separately found that there was no evidence that the presence of air show attendees engaging in

nondisruptive speech activities affected Salute's "ability to deliver its chosen message." Pet. App. 17a. Nor did the Eighth Circuit find any evidence that the spectator speech at issue would be identified as Salute's speech, relying on *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74 (1980) and *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297 (2006) ("*FAIR*"). Pet. App. 17a-18a. Instead, the court found that the evidence supported the contrary, given complaints by some attendees about "the presence of 'protestors' at the event . . . " Pet. App. 18a.

ARGUMENT

The Eighth Circuit's decision soundly applies the principles of this Court's state action decisions in *Brentwood*, 531 U.S. 288, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Lugar*, 457 U.S. 922 and *Burton*, 365 U.S. 715, and First Amendment decisions in *FAIR*, 547 U.S. 47, 126 S. Ct. 1297, *Hurley*, 515 U.S. 557 and *PruneYard*, 447 U.S. 74, to the specific fact situation presented here. The decision below is, moreover, precisely in line with analogous First, Seventh and Ninth Circuit state action opinions in *D'Amario v. Providence Civic Center Auth.*, 783 F.2d 1 (1st Cir. 1986), *Air Line Pilots Assoc. v. Department of Aviation*, 45 F.3d 1144 (7th Cir. 1995), *Lee v. Katz*, 276 F.2d 550 (9th Cir. 2002), *cert. denied*, 536 U.S. 905 (2002), *ACLU v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003), *cert. denied*, 540 U.S. 1110 (2004) and *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983); and the Sixth, Ninth and D.C. Circuits' First Amendment decisions in *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005), *Gathright v. City of Portland, et al.*, 439 F.3d 573 (9th Cir.

2006) and *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997). Contrary to Salute's assertions in the certiorari petition, the Eighth Circuit's decision is not in conflict with the decisions of the Fourth and Sixth Circuits nor is it in tension with any decision of this Court. The petition should, therefore, be denied.

I. The Eighth Circuit's state action holding does not merit a writ of certiorari because it involves a fact-specific application of this Court's decisions and does not conflict with the Fourth Circuit's decision in *Lansing* nor the Sixth Circuit's decision in *Gaston*.

Following this Court's state action precedent, the Eighth Circuit held Salute liable as a state actor upon determining that it engaged in conduct "fairly attributable" to the state. Pet. App. 10a, *quoting*, *Lugar*, 457 U.S. at 937. In so finding, the court recognized that under this Court's precedent its "ultimate conclusion must turn on the particular facts of the case, since 'only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.'" Pet. App. 11a, *quoting*, *Burton*, 365 U.S. at 722. The Eighth Circuit also undertook the proper analysis in finding "fairly attributable" conduct, following this Court's requirement that the alleged deprivation "resulted from the exercise of a right or privilege having its source in state authority" and that the party participating in the deprivation is "appropriately characterized as [a] state actor[ ]" Pet. App. 10a, *quoting*, *Lugar*, 457 U.S. at 939.

Applying these same principles, this Court has found various private entities liable as state actors. For instance, in *Edmonson*, this Court held that a private company

engaged in state action by using peremptory challenges to exclude African-Americans from a jury in a civil action. 500 U.S. at 632. This Court reasoned: "Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints." *Id.* at 620. Additionally, in *Brentwood*, this Court held that a statewide private athletic association (that had both public school and private school members) was liable as a state actor due to "the pervasive entwinement of state schools officials in the structure of the association . . . " 531 U.S. at 291. Similarly, in *Burton*, this Court held both the city and restaurant liable as state actors in refusing to serve a patron based upon his race, noting the symbiotic relationship between the city and private entity in operating the restaurant. 365 U.S. 715. Likewise, in *Lugar*, this Court held that a private business is liable under Section 1983 when using state statutory procedures to collect a debt because making use of a "procedural scheme created by the statute obviously is the product of state action" and the private entity engaged in joint participation with the state because it "invok[ed] the aid of state officials to take advantage of state-created attachment procedures." 457 U.S. at 941.

Before this Court are numerous factors supporting the Eighth Circuit's decision that Salute, too, was a state actor. As set forth above, these factors, which should not be considered separately as Salute suggests at page twelve of its petition, include Salute's dependence on governmental assistance in holding the Air Show, its control over the police and permitted activities on public property, the vast

entwinement between Salute and the City in hosting the Air Show, and most importantly the close nexus between Salute and the City in preventing First Amendment activity on the tarmac, including their joint action and the City's direct approval of Salute's conduct.

Salute's sole contention in support of certiorari review on this issue is that the Eighth Circuit's decision conflicts with the decisions of the Sixth Circuit in *Lansing*, 202 F.3d 821 and the Fourth Circuit in *Gaston*, 43 F.3d 902. In so arguing, Salute ignores the factual distinctions between these cases and the instant one – distinctions which, under this Court's precedent, make a private actor liable as a state actor under Section 1983. As the Eighth Circuit's factual findings reflect, Salute did much more than avail itself of traditional municipal services, including police services. Instead, Salute partnered with the City to co-produce the Air Show, and directed City personnel to effectively prohibit disfavored First Amendment activity at the Air Show. The latter occurred even though those exercising their rights were not in violation of any laws and their presence at the air show was consistent with Salute's and the City's obligation under its agreement with the military to make the air show free and open to the public. By its extensive entwinement with the City, Salute distinguished itself from the private entities at issue in *Lansing* and *Gaston*, and transformed itself into a state actor.

The plaintiff in *Lansing* attempted to preach in an area open to the public without charge and *outside* the event, but police officers directed him to move at the

private entity's request.[2] 202 F.3d at 825-26. Unlike Salute, the private entity in *Lansing* ran the event, provided its own security and required the public to pay admission. *Id.* at 825.

The *Lansing* court first held that the private entity was not a state actor under the exclusive state function test because the city had not ceded control over the areas surrounding the fair, where the plaintiff's speech activities took place. *Id.* at 828-29. In contrast, Salute directed the City's police on the City's property, which the City temporarily gave to it for an air show that required the City's extensive and continued involvement. Pet. App. 89a. Indeed, the Sixth Circuit later noted this distinction in *Parks*, 395 F.3d 643, where it held a city liable under facts similar to those in *Lansing*. In reconciling *Lansing*, the court noted that if the private entity has exclusive control over the public property that would "shift potential liability from the government to the private entity that functions as a state actor." *Parks*, 395 F.3d at 652, n.8 (citation omitted). *See also*, *Lee*, 276 F.2d at 556 (in attributing state actor status to private entity, court noted that *Lansing* did not apply because the city "retained little, if any, power over the [private entity's] free speech policies governing the commons.").

In addition, the *Lansing* court found insufficient evidence to meet the nexus test. 202 F.3d at 830. As the Eighth Circuit recognized, "[t]he active and prearranged role of the police in effectuating the event's private speech policies also sets this case apart from *Lansing* . . . [where]

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[2] Like the present case, the city in *Lansing* did not appeal the judgment finding it liable under 42 U.S.C. § 1983.

the City of Memphis had made no attempt to instruct its officers on how to police unwanted speech activities on festival grounds." Pet. App. 13a. Although the plaintiff did not meet the "nexus test" in *Lansing*, the Eighth Circuit correctly found it applied here, where "the police department's security plan instructed the officers to enforce Salute's rules rather than city ordinances, and the police took an active role in identifying and intercepting protesters at the air show, including Wickersham and Doyle." Pet. App. 14a. As a result, unlike *Lansing*, Salute did not merely request that the police eject Plaintiffs, but had the authority to direct the police to do so.[3] Further, as the Eighth Circuit and the district court summarized, the City's involvement in the Air Show and in restricting First Amendment speech based upon Salute's orders went far beyond what existed in *Lansing*. Pet. App. 13a-15a and 89a-90a.

Likewise, there is no conflict between the Eighth Circuit's decision in this case and the Fourth Circuit's opinion in *Gaston*, 43 F.3d 902. The *Gaston* court held that a private entity which organized an annual festival was not a state actor. *Id.* at 902. The group held the festival on public streets and sidewalks (under a permit) and on private property. *Id.* at 904-05. Although the city provided police protection, traffic assistance and sanitation services,

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[3] Nor does the record support that air show attendees who engage in speech activities lose their right to attend as Salute contends in its petition. As a condition of obtaining the military aircraft, personnel and equipment for the air show, Salute and the City guarantee that the air show is "open to the public." Pet. App. 4a. Attendees are not, therefore mere invitees as Salute claims. They are entitled to be on the premises as a condition of the federal government supplying the foregoing – without which there would be no air show.

in all other respects it was independent of the city and the city played no role in planning or managing the festival. *Id.* At issue was the private entity's failure to provide the UAW leased booth space because the union's intended message was outside the festival's purpose. *Id.* at 905. Here, Plaintiff's have not requested booth space, to fly in the air show or to participate in the noon time services.

The most glaring distinction between the present case and *Gaston* is that the plaintiff in that case *conceded* the absence of a nexus between the private organizer and the city. Pet. App. at 13a, *citing*, *Gaston*, 43 F.3d at 909 n.4. In addition, the *Gaston* court did not address the entanglement issue and distinguished this Court's decision in *Evans v. Newton*, 382 U.S. 296 (1966) on the basis that the city in *Newton* continued to be involved in the park even after it relinquished ownership. *Gaston*, 43 F.3d at 908. Like *Newton*, the City here continued to be intimately involved in the air show and Salute, and in particular the speech prohibitions that led to the finding of a constitutional violation, after supposedly temporarily relinquishing ownership of the secured tarmac.

As Salute recognizes in its petition, the *Gaston* court instead applied the traditional and exclusive government function test to the facts of that case. The Eighth Circuit plainly did not find that Salute was a state actor because it was performing a traditional and exclusive government function. Instead, its decision repeatedly refers to the entanglement and close nexus between the City and Salute. It found that Salute did not merely act with the City's acquiescence but with significant aid from City officials through, among other things, its police officer's direct enforcement of Salute's private speech restrictions. The fact that the Eighth Circuit and the *Gaston* court did

not rely on the same test to examine the presence of state action is another reason there can be no conflict between these two cases.

Moreover, regardless of the test applied, the state action analysis is fact intensive and the facts in *Gaston* are vastly different from the present case. Although police provided protection services at the fair in *Gaston*, there was no evidence of a nexus between the private entity and police officers in enforcing the private entity's booth policy. In contrast, as the Eighth Circuit found, the evidence in this case established that "Salute and the city were knowingly and pervasively entangled in the enforcement of the challenged speech restrictions . . . "[4] Pet. App. 15a. Therefore, unlike *Gaston*, the Eighth Circuit's unchallenged factual findings were that Salute was not merely relying on public services but instead using City police as its own private security force, going "beyond the kind of neutral assistance that would normally be offered private citizens in enforcing the law of trespass." Pet. App. 14a.

Contrary to Salute's argument, due to the close nexus between the City and Salute in enforcing the speech restrictions, as well as their significant entwinement in producing the air show, the *Gaston* court's stated concern that imposing state actor status in that case would interfere with other private events on public property, such as a softball league, family barbecue, or wedding (43 F.3d at 911), is inapplicable here. The Eighth Circuit correctly found that this was not in fact your average private event,

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[4] In fact, the City formulated and enforced an air show security plan based totally on Salute's rules as to what speech it chose to prohibit even though the speech did not violate any local, state or federal laws. Pet. App. 5a and 14a.

but one fraught with a sufficient nexus and entwinement between private and city officials to impose state actor status.

Finally, the Eighth Circuit's opinion is consistent with other circuit court decisions imposing state actor status on private entities. These cases include: *D'Amario*,783 F.2d at 2-3, where the First Circuit held that a private event organizer was a state actor where state personnel were wholly responsible for the enforcement of the organizer's speech restrictions; *Air Line Pilots*, 45 F.3d at 1149-50, where the Seventh Circuit found that a private entity, though ultimately responsible for barring the union's advertisement, was a state actor because the city continued to have discretion in accepting or rejecting advertisements and due to the symbiotic relationship between the two entities; *Lee*, 276 F.2d at 554, where the Ninth Circuit held that a private entity was a state actor where it held a long-term lease to control public property because it developed policies regarding speech that were not subject to comment or approval by government; *ACLU*, 333 F.3d at 1098, where the Ninth Circuit held that the private manager of a city-owned street mall, as well as the city, engaged in state action in barring leafleting and unauthorized vendors from the mall due to its "pervasive entanglement with the City of Las Vegas and performance of an exclusively and traditionally public function"; and *Howerton*, 708 F.2d at 385, where the Ninth Circuit found that the active and ongoing police involvement in ejecting a tenant made the landlord a state actor.

In conclusion, the panel decision does not conflict with Fourth and Sixth Circuit precedent, Salute's only stated basis for certiorari review of the Eighth Circuit's state action holding.

II. The Eighth Circuit's holding that Salute's First Amendment rights were not violated does not merit a writ of certiorari because it is fact-specific and does not conflict with *Hurley*, nor is *Hurley* even implicated.

The Eighth Circuit's decision is consistent with this Court's decisions, including *Hurley*, 515 U.S. 557, *Prune-Yard*, 447 U.S. 74 and *FAIR*, 547 U.S. 47, 126 S. Ct. 1297, in finding that Salute did not have a First Amendment right to preclude attendees at this public air show from engaging in non-disruptive speech that does not alter or otherwise become part of Salute's official message. In so holding, the court recognized that under *Hurley*, "the state cannot compel a private entity to disseminate particular views or to alter its message to suit the government."[5] Pet at 16a. Relying on the facts before it, the Eighth Circuit held, however, that the plaintiffs' exercise of their First Amendment rights pursuant to the terms of the district court's order would do neither. Pet. App. 17a-18a. Therefore, Salute failed to meet its burden of proof regarding this fact-specific inquiry.

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[5] The Eighth Circuit explicitly did not address whether *Hurley* protects a state actor's speech, stating:

> Whether a private entity like Salute forfeits some of its right to deliver its own message unimpeded by others when it assumes the role of state actor need not be decided on this record because Salute has not shown that the injunction infringed its own ability to deliver its chosen message.

Pet. App. 17a. Hence, this Court need not resolve the question of the applicability of *Hurley* to private speakers deemed to be state actors under Section 1983 because, assuming *arguendo Hurley* is applicable, Salute has not proven its speech rights were violated.

In *Hurley*, this Court held that the private entity – the parade organizer – had a First Amendment right to control its message, "which was communicated by the composition of the parade." Pet. App. at 16a, *citing*, *Hurley*, 515 U.S. at 566. This Court did not suggest, however, that a parade organizer could control the speech activities of those watching the parade. Recognizing this distinction, the Eighth Circuit, like other United States Courts of Appeal,[6] analyzed whether *Hurley* provides the organizer of a large public event a First Amendment right to prohibit all disfavored speech activities at that event.

The Eighth Circuit's opinion did not rest upon a finding that the air show was more like a shopping mall than a parade, as Salute contends at page 19 of its petition. Instead, the Eighth Circuit's first order of business, consistent with the *Hurley* analysis, was to determine the boundaries of Salute's speech. On that issue, the court concluded that, unlike the parade in *Hurley*, the open areas of the expansive air show grounds were not part of Salute's speech because Salute failed to show "that its message was dependent upon the composition of the crowd . . ."[7] Pet. App. at 17a. Because Salute did not

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[6] *See, e.g.*, *Mahoney*, 105 F.3d 1452, where the D.C. Circuit found that the government could not interfere with a parade viewers' speech rights; *Gathright*, 439 F.3d at 577, where the Ninth Circuit held that a proselytizer could engage in speech activities at a privately run event open to the public because "[m]erely being present at a public event does not make one part of the event organizer's message for First Amendment purposes.") (citations omitted).

[7] Without citing any record evidence, Salute claims at various points in its petition that the crowd at the air show gathers together for the common purpose of honoring veterans. Given the tens of thousands of people that attend this fair-like event (Pet. App. 2a and 24a), Salute's presumption regarding others' intentions does not constitute evidence.

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establish this fact, which would have made those in the open areas of the air show more comparable to a parade participant, the panel next considered whether allowing speech in the open areas of the air show would somehow impede Salute from delivering its chosen message.

In conducting this analysis, the Eighth Circuit did not create new tests or exceptions to *Hurley*, as Salute suggests in its petition (pp. 19-20). Instead, by assessing whether outside speech activities would disrupt or dilute the event, the court merely considered whether the evidence supported a conclusion that the public's speech would in fact alter, i.e., interfere with or appear to be Salute's speech – an analysis supported by established law. Indeed, in *FAIR* this Court characterized the constitutional violation in *Hurley* as "result[ing] from the fact that the complaining speaker's own message was *affected* by the speech it was forced to accommodate." 126 S. Ct. at 1309 (emphasis added). Applying this reasoning, the *FAIR* Court found that the plaintiff law schools could not avoid association with military recruiters by asserting free expression rights, noting that even high school students "can appreciate the differences between speech a school sponsors and speech the school permits because legally required to do so." 126 S. Ct. at 1310. Likewise, in *Prune-Yard*, this Court held that a state law that protected the collection of signatures at a private mall was constitutional because the mall was open to the public and solicitations

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Instead, as the district court concluded, "[t]he Air Show is a fair like event that entertains and educates and provides a good crowd for Memorial Day ceremonies." Pet. App. 36a.

were unlikely to be perceived to be those of the owner. 447 U.S. at 87.[8]

As the Eighth Circuit found, given that the crowd was not part of Salute's message, Salute had the burden to prove that nondisruptive, expressive conduct would otherwise interfere with or be perceived as Salute's message. Pet. App. at 17a. Salute failed to meet its evidentiary burden.[9] Pet. App. 17a-18a. As a result, the Eighth Circuit correctly applied existing precedent to the facts of this case; and the record evidence provides no basis for this Court to reexamine or clarify *Hurley* as Petitioner requests.

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[8] *See also*, *Parks*, 395 F.3d at 651 (proselytizer had right to engage in speech at art festival where it did not interfere with or prevent art festival's message).

[9] Salute also cites *Hawkins v. City and County of Denver*, 170 F.3d 1281 (10th Cir. 1999), for the proposition that a state actor can restrict speech activities in a non-public forum. Salute did not appeal the district court's finding that the speech activities at issue must be allowed at the air show despite its non-public forum status, nor did Salute raise this as an issue in its petition for writ of certiorari before this Court. Therefore, this case provides no support for Salute's petition.

CONCLUSION

The present case does not warrant this Court's grant of certiorari because the Eighth Circuit correctly applied this Court's precedents, its decision is not in conflict with any Court of Appeal decisions and its decision pivots on a very fact-specific inquiry. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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